IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FOREST LABORATORIES, INC., FOREST LABORATORIES HOLDINGS, LTD., MERZ PHARMA GMBH & CO. KGAA, MERZ PHARMACEUTICALS GMBH and ADAMAS PHARMACEUTICALS, INC.,

Plaintiffs,

v.

TEVA PHARMACEUTICALS USA, INC., WOCKHARDT USA LLC, WOCKHARDT BIO AG, WOCKHARDT LTD., SUN PHARMA GLOBAL FZE and SUN PHARMACEUTICAL INDUSTRIES, LTD.,

Defendants.

C.A. No. 14-121 (LPS)

FOREST LABORATORIES, INC., FOREST LABORATORIES HOLDINGS, LTD. and ADAMAS PHARMACEUTICALS, INC.,

Plaintiffs,

v.

APOTEX CORP., APOTEX INC.,ZYDUS PHARMACEUTICALS (USA), INC., CADILA HEALTHCARE LTD. (d/b/a/ ZYDUS CADILA), PAR PHARMACEUTICAL, INC., ANCHEN PHARMACEUTICALS, INC. and ACTAVIS LABORATORIES FL, INC.,

Defendants.

C.A. No. 14-200 (LPS)

FOREST LABORATORIES, INC., FOREST LABORATORIES HOLDINGS, LTD., MERZ PHARMA GMBH & CO. KGAA, MERZ PHARMACEUTICALS GMBH and ADAMAS PHARMACEUTICALS, INC., Plaintiffs, v. AMNEAL PHARMACEUTICALS LLC, AMNEAL PHARMACEUTICALS OF NEW YORK, LLC, AMERIGEN PHARMACEUTICALS, INC., AMERIGEN PHARMACEUTICALS LTD. and MYLAN PHARMACEUTICALS INC., Defendants.	C.A. No. 14-508 (LPS)
FOREST LABORATORIES, INC., FOREST LABORATORIES HOLDINGS, LTD. and ADAMAS PHARMACEUTICALS, INC., Plaintiffs, v. RANBAXY INC., RANBAXY LABORATORIES LIMITED and TEVA PHARMACEUTICALS USA, INC., Defendants.	C.A. No. 14-686 (LPS)

FOREST LABORATORIES, LLC, FOREST LABORATORIES HOLDINGS, LTD. and ADAMAS PHARMACEUTICALS, INC., Plaintiffs, v. LUPIN LIMITED, LUPIN PHARMACEUTICALS, INC., PAR PHARMACEUTICAL, INC., ANCHEN PHARMACEUTICALS, INC., AMERIGEN PHARMACEUTICALS, INC., and AMERIGEN PHARMACEUTICALS LTD., Defendants.	)	C.A. No. 14-1058 (LPS)
FOREST LABORATORIES, LLC, FOREST LABORATORIES HOLDINGS, LTD. and ADAMAS PHARMACEUTICALS, INC., Plaintiffs, v. AMERIGEN PHARMACEUTICALS, INC. and AMERIGEN PHARMACEUTICALS LTD., Defendants.	)	C.A. No. 14-1271 (LPS)

PLAINTIFFS' MOTION TO STRIKE THE REPLY DECLARATION OF RICHARD F. BERGSTROM AND THE RELATED PORTIONS OF DEFENDANTS' REPLY CLAIM CONSTRUCTION BRIEF

OF COUNSEL:

Peter J. Armenio, P.C.
Robert B. Wilson
Anne S. Toker
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
New York, NY 10010
(212) 849-7000

July 24, 2015

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Maryellen Noreika (#3208)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
mnoreika@mnat.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. DR. BERGSTROM'S REPLY DECLARATION AND THE RELATED ARGUMENTS IN DEFENDANTS' REPLY BRIEF SHOULD BE STRICKEN.............2

  A. The Parties Negotiated a Revised Schedule to Accommodate Orderly Expert Discovery 2

  B. Defendants’ Reply Declaration And Related Arguments Subvert the Agreed-Upon Schedule and Unfairly Prejudice Plaintiffs......................................3

III. ALTERNATIVELY, PLAINTIFFS SHOULD BE PERMITTED TO FILE A RESPONSE TO DEFENDANTS’ UNTIMELY OPINIONS 5

IV. CONCLUSION..5

I. INTRODUCTION

Plaintiffs move to strike the untimely Reply Declaration of Defendants' expert, Dr. Bergstrom, and the related new arguments in Defendants' Reply Claim Construction Brief, filed on July 15, 2015 – both of which violate the provisions of the Scheduling Order and the agreement of the parties. After serving their opening claim construction briefs, the parties agreed to extend the originally scheduled date for the *Markman* hearing so that each side could depose the other side's claim construction experts and file short reply briefs limited to that deposition testimony. The objective was to ensure that there would be time to depose the claim construction experts regarding their declarations and to provide an orderly way to report relevant deposition testimony to the Court before the *Markman* hearing. Defendants' recently filed Reply Declaration of Dr. Bergstrom and accompanying reply brief subvert the parties' agreement and undermine its objective in that they introduce new opinions and arguments not presented in Defendants' original submissions. Nothing in the revised Scheduling Order provides for or permits Defendants to submit a second round of expert declarations, let alone an additional round of declarations and briefing setting out new claim construction arguments and contentions. Indeed, Defendants' actions give rise to exactly the prejudice that the parties sought to avoid by agreeing to revise the claim construction schedule in the first place.

For all these reasons, as explained in more detail below, Plaintiffs respectfully request that the Court strike, or at the least not credit, the Reply Declaration of Dr. Bergstrom and the related new arguments in Defendants' reply brief.

II. DR. BERGSTROM'S REPLY DECLARATION AND THE RELATED ARGUMENTS IN DEFENDANTS' REPLY BRIEF SHOULD BE STRICKEN

The Court entered the original Scheduling Order in this case on November 20, 2014. D.I. No. 61.[1] That Order provided that the parties would exchange initial claim construction briefs on March 19, 2015 and responsive briefs on April 16, 2015. The *Markman* hearing was scheduled for May 4, 2015. The Scheduling Order expressly provided that "[n]o reply briefs or supplemental papers on claim construction shall be submitted without leave of the Court." *Id*. at ¶ 11.

A. The Parties Negotiated a Revised Schedule to Accommodate Orderly Expert Discovery

The parties filed and served initial claim construction briefs on March 27, 2015 pursuant to a stipulated agreement between the parties to extend the due date by one week to March 26, 2015 (D.I. 85) and a request by Defendants on the afternoon of March 26 for a further courtesy extension of one day, to which Plaintiffs agreed. Defendants submitted two expert declarations with their opening brief. Plaintiffs did not submit an expert declaration with their opening brief, but informed Defendants that they intended to submit an expert declaration with their responsive brief. Because the original Scheduling Order did not set out a schedule for expert depositions or subsequent briefing as part of the claim construction process, the parties, after considerable negotiations and discussions, agreed to revise the Scheduling Order to provide sufficient time before the *Markman* hearing for the deposition of each claim construction expert and to allow a short reply brief for each side directed to expert issues. *See* D.I. 94. Pursuant to the parties' request, the Court modified the claim construction schedule to provide for expert depositions following submission of the parties' responsive claim construction briefs, and also for each party to submit a short reply brief (limited to 10 pages) "on expert witness issues only." D.I. 96.

[1] Citations to the docket refer to C.A. No. 14-121-LPS.

Further pursuant to the parties' request, the Court moved the date of the *Markman* hearing to August 3, 2015.

The parties filed and served responsive claim construction briefs on May 7, 2015. Along with their responsive brief, Plaintiffs also served the declaration of their expert, Dr. James F. Polli. Depositions of the parties' experts proceeded on May 14, June 24, and June 25, 2015.

B. Defendants' Reply Declaration And Related Arguments Subvert the Agreed-Upon Schedule and Unfairly Prejudice Plaintiffs

In contravention of the parties' agreement and the revised Scheduling Order, Defendants submitted on July 15, 2015, along with their reply claim construction brief, a thirteen-page Reply Declaration from their expert, Dr. Bergstrom. In this Reply Declaration, Dr. Bergstrom attempts to introduce new arguments on claim construction and alleged indefiniteness that do not appear anywhere in his initial declaration, apparently in an effort to address weaknesses in his analysis that were exposed during Dr. Bergstrom's deposition. For example, Dr. Bergstrom was questioned regarding his improper use of extrinsic evidence to support his arguments on the alleged indefiniteness of the dC/dT claim element. In his Reply Declaration, Dr. Bergstrom cites for the first time portions of the patents and prosecution history that he did not rely on in his initial declaration (*id*. at ¶¶ 16-19), and attempts to rehabilitate his deposition testimony with after-the-fact explanations and discussion (*id*. at ¶¶ 16-19, 20-29), including even more improper extrinsic evidence.

The revised Scheduling Order does not provide for or permit a second round of expert declarations or an expert declaration "do over" after a revealing deposition. Indeed, Defendants' unilateral second round of expert declarations, and the related new arguments in their reply brief, completely undermine the negotiated revisions to the original Scheduling Order, which was intended to provide an orderly procedure for expert depositions and written submissions to the

Court regarding those depositions. Now, with just over one week to go before the *Markman* hearing, Defendants seek to prejudice Plaintiffs in precisely the manner that the parties sought to avoid with their earlier agreement.

At no time before Defendants filed their reply brief and Dr. Bergstrom's Reply Declaration did Defendants indicate that they intended to submit an additional expert declaration. Nor did they propose any modification of the schedule to allow Plaintiffs adequate time to review such an additional declaration, depose the declarant, and make an appropriate submission to the Court. Defendants' unilateral and unannounced filing of a second round of declarations is inexcusable, as it appears timed to maximize the potential prejudice to Plaintiffs on the eve of the *Markman* hearing. Had Defendants sought in good faith to serve a reply expert declaration, they could have raised the issue during the parties' earlier discussions or, at the very least, notified Plaintiffs that they intended to serve a reply declaration in the month and a half between Dr. Polli's declaration on May 7, 2015 and Dr. Bergstrom's deposition on June 24, 2015.[2] Defendants did none of these things, choosing stealth and surprise over the orderly disclosure required by the revised Scheduling Order.

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[2] Following a meet and confer among the parties on July 21, Defendants indicated that they would be willing to make Dr. Bergstrom available for a second deposition "limited to the opinions in his reply declaration and a three hour time limit" on either July 28 or July 29, 2015. *See* Exhibit 2. However, a last-minute deposition regarding new opinions from Dr. Bergstrom only days before the *Markman* hearing will not cure the prejudice resulting from Defendants' submission of a completely new expert declaration. And Defendants' proposed dates next week of July 28 and July 29 do not provide sufficient time for Plaintiffs to prepare a written submission on the new testimony that the Court will reasonably be able to consider before the hearing on August 3, 2015. As such, Defendants' offer to make Dr. Bergstrom available for a second deposition on the eve of the *Markman* hearing is much too little, much too late.

Defendants' actions warrant a strong remedy. Accordingly, Plaintiffs respectfully request that the Court strike, or not credit, the untimely Reply Declaration of Dr. Bergstrom and the related arguments in Defendants' reply claim construction brief.

III. ALTERNATIVELY, PLAINTIFFS SHOULD BE PERMITTED TO FILE A RESPONSE TO DEFENDANTS' UNTIMELY OPINIONS

If the Court is inclined to consider Dr. Bergstrom's Reply Declaration and related opinions and arguments, Plaintiffs respectfully request leave to file a short response to provide the Court with a complete record to decide the pending claim construction and alleged indefiniteness issues. Such a response would be particularly appropriate given Defendants' attempt to undercut the parties' agreement regarding expert discovery by submitting Dr. Bergstrom's Reply Declaration and related new arguments on the eve of the *Markman* hearing. Attached at Exhibit 1 to this motion is Plaintiffs' proposed Response To The Reply Declaration Of Dr. Richard F. Bergstrom And Defendants' Reply Claim Construction Brief for the Court's consideration.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and strike the Reply Declaration of Dr. Bergstrom and the related arguments in Defendants' reply brief. Alternatively, Plaintiffs request leave to file the attached Response at Exhibit 1.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Maryellen Noreika

Jack B. Blumenfeld (#1014)
Maryellen Noreika (#3208)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
mnoreika@mnat.com

Attorneys for Plaintiffs

OF COUNSEL:

Peter J. Armenio, P.C.
F. Dominic Cerrito
Robert B. Wilson
Anne S. Toker
Kate E. Cassidy
QUINN EMANUEL
URQUHART & SULLIVAN, LLP
51 Madison Avenue
New York, NY 10010
(212) 849-7000

July 24, 2015
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7.1.1 CERTIFICATION

I hereby certify that the subject of the foregoing motion has been discussed with counsel for the defendants and that we have not been able to reach agreement.

/s/ Maryellen Noreika

Maryellen Noreika (#3208)

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2015, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on July 24, 2015, upon the following in the manner indicated:

Richard L. Horwitz, Esquire — *VIA ELECTRONIC MAIL*
David E. Moore, Esquire
Bindu A. Palapura, Esquire
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, DE 19801
Attorneys for Defendant Teva Pharmaceuticals USA, Inc.

Jeffer Ali, Esquire — *VIA ELECTRONIC MAIL*
Jennell C. Bilek, Esquire
Christopher A. Pinahs, Esquire
Mark D. Schuman, Esquire
CARLSON, CASPERS, VANDENBURGH, LINDQUIST & SCHUMAN, P.A.
225 South Sixth Street, Suite 4200
Minneapolis, MN 55402
Attorneys for Defendant Teva Pharmaceuticals USA, Inc.

John C. Phillips, Jr., Esquire — *VIA ELECTRONIC MAIL*
Megan C. Haney, Esquire
David A. Bilson, Esquire
PHILLIPS, GOLDMAN & SPENCE, P.A.
1200 North Broom Street
Wilmington, DE 19806
Attorneys for Defendant Mylan Pharmaceuticals

Jonathan D. Parente, Esquire *VIA ELECTRONIC MAIL*
James C. Grant, Esquire
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
Attorneys for Defendant Mylan Pharmaceuticals

Deepro R. Mukerjee, Esquire *VIA ELECTRONIC MAIL*
Poopak Banky, Esquire
Lance A. Soderstrom, Esquire
ALSTON & BIRD LLP
90 Park Avenue
New York, NY 10016
Attorneys for Defendant Mylan Pharmaceuticals

Richard K. Herrmann, Esquire *VIA ELECTRONIC MAIL*
Kenneth L. Dorsney, Esquire
MORRIS JAMES LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801
Attorneys for Defendants Sun Pharma Global FZE and Sun Pharmaceutical Industries, Ltd.

Sailesh K. Patel, Esquire *VIA ELECTRONIC MAIL*
Imron T. Aly, Esquire
A. Taylor Corbitt, Esquire
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
Attorneys for Defendants Sun Pharma Global FZE and Sun Pharmaceutical Industries, Ltd.

Gina M. Bassi, Esquire *VIA ELECTRONIC MAIL*
SCHIFF HARDIN LLP
666 Fifth Avenue, Suite 1700
New York, NY 10103
Attorneys for Defendants Sun Pharma Global FZE and Sun Pharmaceutical Industries, Ltd.

Joseph J. Bellew, Esquire *VIA ELECTRONIC MAIL*
COZEN O'CONNOR
1201 North Market Street, Suite 1001
Wilmington, DE 19801
Attorneys for Defendants Apotex Corp. and Apotex Inc.

Kerry B. McTigue, Esquire *VIA ELECTRONIC MAIL*
Barry P. Golob, Esquire
W. Blake Coblentz, Esquire
Aaron S. Lukas, Esquire
COZEN O'CONNOR
The Army & Navy Club Building, Suite 1100
1627 I Street, N.W.
Washington, DC 20006
Attorneys for Defendants Apotex Corp. and Apotex Inc.

Keri L. Schaubert, Esquire *VIA ELECTRONIC MAIL*
COZEN O'CONNOR
277 Park Avenue
New York, NY 10172
Attorneys for Defendants Apotex Corp. and Apotex Inc.

Francis J. Murphy, Esquire *VIA ELECTRONIC MAIL*
MURPHY & LANDON
1011 Centre Road, Suite 210
Wilmington, DE 19805
Attorneys for Defendants Zydus Pharmaceuticals (USA), Inc. and Cadila Healthcare Limited

Michael J. Gaertner, Esquire *VIA ELECTRONIC MAIL*
David B. Abramowitz, Esquire
Timothy F. Peterson, Esquire
Emily L. Savas, Esquire
LOCKE LORD LLP
111 South Wacker Drive
Chicago, IL 60606
Attorneys for Defendants Zydus Pharmaceuticals (USA), Inc. and Cadila Healthcare Limited

Neal C. Belgam, Esquire *VIA ELECTRONIC MAIL*
SMITH, KATZENSTEIN & JENKINS LLP
800 Delaware Avenue, Suite 1000
Wilmington, DE 19801
Attorneys for Defendants Amneal Pharmaceuticals LLC and Amneal Pharmaceuticals of New York LLC

Constance S. Huttner, Esquire *VIA ELECTRONIC MAIL*
James Barabas, Esquire
Anandita Vyakarnam, Esquire
Alfred Henry Heckel, Esquire
BUDD LARNER, P.C.
150 John F. Kennedy Parkway
Short Hills, NJ 07078-2703
Attorneys for Defendants Amneal Pharmaceuticals LLC and Amneal Pharmaceuticals of New York LLC

Kelly E. Farnan, Esquire *VIA ELECTRONIC MAIL*
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801
Attorneys for Defendants Amerigen Pharmaceuticals, Inc. and Amerigen Pharmaceuticals Ltd.

William A. Rakoczy, Esquire *VIA ELECTRONIC MAIL*
Paul J. Molino, Esquire
Tara M. Raghavan, Esquire
Eric R. Hunt, Esquire
Patrick C. Kilgore, Esquire
RAKOCZY MOLINO MAZZOCHI SIWIK LLP
6 West Hubbard Street, Suite 500
Chicago, IL 60654
Attorneys for Defendants Amerigen Pharmaceuticals, Inc. and Amerigen Pharmaceuticals Ltd.

Richard D. Kirk, Esquire
Stephen B. Brauerman, Esquire
Vanessa R. Tiradentes, Esquire
Sara E. Bussiere, Esquire
BAYARD, P.A.
222 Delaware Avenue, Suite 900
P.O. Box 25130
Wilmington, DE 19899-5130
Attorneys for Defendants Lupin Limited and Lupin Pharmaceuticals, Inc.

VIA ELECTRONIC MAIL

Douglass C. Hochstetler, Esquire
Christine A. Dudzik, Esquire
Constantine Koutsoubas, Esquire
KELLEY DRYE & WARREN LLP
333 West Wacker Drive, 26th Floor
Chicago, IL 60606
Attorneys for Defendants Lupin Limited and Lupin Pharmaceuticals, Inc.

VIA ELECTRONIC MAIL

Beth D. Jacob, Esquire
Clifford Katz, Esquire
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
Attorneys for Defendants Lupin Limited and Lupin Pharmaceuticals, Inc.

VIA ELECTRONIC MAIL

/s/ Maryellen Noreika

Maryellen Noreika (#3208)